No. 97-7541

In The

Supreme Court of the United States

October Term, 1997

AMANDA MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Petitioner pleaded guilty to non-capital charges. At sentencing, the court imposed a ten-year mandatory minimum term expressly predicated on the adverse inference it drew from her silence concerning the quantity of drugs "involved" in her conspiracy offense.

Does the Fifth Amendment privilege protect the defendant against increased punishment based on the court's drawing of an adverse inference from her silence at sentencing?

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BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION IN SUPPORT OF PETITIONER

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS and FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION file this amicus curiae brief pursuant to this Court's Rule 37.3(a) in support of petitioner Amanda Mitchell's assertion of rights under the Fifth Amendment. Both petitioner and respondent have granted amici NACDL and FAMM consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

INTERESTS OF AMICI CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation founded 40 years ago, numbering some 10,000 attorneys, including citizens of every state. The NACDL has over 70 state and local affiliates with a combined membership of about 28,000.

NACDL is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. The American Bar Association

[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NACDL, FAMM and their members, made any monetary contribution to its preparation or submission. *See* Rule 37.6.

recognizes NACDL as an affiliate and accords it representation in its House of Delegates.

NACDL was founded to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties, as guaranteed by the original Constitution and the Bill of Rights. One of its particular concerns is the defense of the Fifth Amendment privilege against compulsory self-incrimination, as one of the constitutional provisions which is least understood and appreciated by the lay public, yet which is of the highest value in the preservation of a free society which respects the dignity and autonomy of every individual, including the criminally accused and suspected.

Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan, educational association that conducts research and engages in advocacy regarding mandatory minimum sentencing laws. FAMM argues that such laws, of which 21 U.S.C. § 841(b) is the primary federal example, are expensive and inefficient, perpetuate unwarranted and unjust sentencing disparities, and transfer the sentencing function unwisely from the judiciary to the prosecution. Founded in 1991, FAMM has over 33,000 members nationwide, constituting over 25 chapters in as many states and the District of Columbia. FAMM does not contend that crime should go unpunished, but rather that the punishment should fit the crime. FAMM and its members are deeply troubled that the Third Circuit's narrowing of the Fifth Amendment privilege in this case has allowed the application of

a mandatory minimum sentence that would not otherwise apply.

SUMMARY OF ARGUMENT

A criminal defendant who has pleaded guilty retains the right to invoke the Fifth Amendment privilege against being compelled to be a witness against herself at sentencing. The Third Circuit erred in affirming an increased sentence that was expressly predicated on drawing an adverse inference from the defendant-petitioner's silence.

The clause applies by its terms to petitioner's failure to counter the assertions of cooperating accomplice witnesses about the amount of drugs "involv[ed]," 21 U.S.C. § 841(b)(1)(A), under the federal mandatory minimum sentencing law, in her violation of the controlled substance conspiracy statute, *id.* § 846. Sentencing occurs "in a criminal case," and when the court draws an adverse inference from silence, it is imposing compulsion "to be a witness." Information that increases a defendant's sentence is used "against" her. Nothing in the language of the Amendment itself demands that there also be a risk of "self-incrimination" on the substance of the charges.

Even if the Fifth Amendment privilege protects only against a "real and substantial risk of self-incrimination," *Marchetti v. United States*, 390 U.S. 39, 48 (1968), the privilege was not inapplicable on the basis that petitioner had pleaded guilty. At the time of the plea she did not waive her Fifth Amendment right of silence except to the extent necessary to enter the plea; that is, she only waived the right to remain absent from the witness stand at trial had

she adhered to her initial plea of not guilty. Fed.R.Crim.P. 11(c)(3). Petitioner's plea did not waive her right to appeal, and during the sentencing hearing her conviction was not yet final.

It should have been evident to the sentencing court, even without an assertion to this effect, that petitioner's answers to the judge's questions could also have incriminated her on several criminal charges beyond those to which she had pleaded guilty. In that circumstance, this Court's cases do not require her to explain the basis of her claim of the constitutional privilege or limit the validity of the claim to the bases her counsel may assert. *Malloy v. Hogan*, 378 U.S. 1, 14 (1964); *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

The judgment below must be reversed.

ARGUMENT

THE FIFTH AMENDMENT PRIVILEGE PROTECTS A CRIMINAL DEFENDANT WHO HAS PLEADED GUILTY AGAINST THE DRAWING OF AN ADVERSE INFERENCE WHICH IS USED TO INCREASE HER SENTENCE.

Petitioner Mitchell pleaded guilty to all counts against her in the indictment but asserted a right not to provide information that could subject her to increased punishment in either this case or in another, later prosecution. The sentencing judge held that this refusal warranted the drawing of an adverse inference that tipped the balance to satisfy the government's burden of establishing that the extent of her conduct created liability for

a conspiracy, in violation of 21 U.S.C. § 846, "involving" more than five kilograms of cocaine, resulting in the imposition of a mandatory minimum ten-year term. 21 U.S.C. § 841(b)(1)(A).[2] Without this inference, the record does not show that the district court, sitting as factfinder for sentencing purposes, would have found the government's cooperating witnesses sufficiently credible, in their description of petitioner's involvement, to support the same conclusion. Pet. Appx. 6-7; *United States v. Mitchell*, 122 F.3d 185, 188 (1997).[3] The guideline sentence, as

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[2] Petitioner was also convicted on three counts of violating 21 U.S.C. § 860 (distribution of controlled substance within 1000 feet of a school). None of these counts "involved" an amount of cocaine sufficient to trigger a mandatory minimum term. In the absence of an overriding mandatory minimum, the U.S. Sentencing Guidelines would call for equal, concurrent sentences (*see* USSG § 5G1.2(b), (c)) based on the aggregate amount of controlled substances deemed "relevant," that is, the amount for which petitioner was individually responsible. This would include amounts of controlled substances foreseeably distributed by others "in furtherance of the jointly undertaken criminal activity," USSG § 1B1.3(a)(1)(B), that were "part of the same course of conduct or common scheme or plan as the offense[s] of conviction." *Id.* § 1B1.3(a)(2). Based on the quantity of cocaine attributed to petitioner by the sentencing court on the basis of the adverse inference it drew from her silence, the guideline range without regard to the ten-year mandatory minimum would have been 97 to 121 months. *United States v. Mitchell*, 122 F.3d 185, 186 (1997).

[3] Thus, if the courts below committed constitutional error, it could not be deemed harmless under any standard, much less harmless beyond a reasonable doubt. *Harrington v. California*, 395 U.S. 250, 254 (1969); *Chapman v. California*, 386 U.S. 18, 24 (1967).

urged by the defense, would otherwise not have exceeded two and a half years' imprisonment.

The Third Circuit affirmed on the basis that the Fifth Amendment's privilege against compulsory self-incrimination does not apply at sentencing following a guilty plea. Pet. Appx.; *United States v. Mitchell*, 122 F.3d at 188-91 (1997). Judge Michel, sitting by designation, concurred in the result only.[4] Four Circuit Judges (Becker, Scirica, Mansmann and Nygaard, JJ.) dissented from denial of rehearing in banc. Commentators immediately noticed that the Third Circuit's opinion in this case:

> marked a dramatic departure from the overwhelming weight of case law. Every other circuit that has ruled on this issue has decided that a defendant retains her Fifth Amendment privilege if her testimony could be used to increase her sentence.

Recent Cases, 111 Harv.L.Rev. 1140, 1142 (1998) (noting and sharply criticizing decision below).[5]

The erroneous decision of the court below has enormous institutional significance. Over 90% of federal criminal defendants whose cases are not dismissed plead guilty. Bureau of Justice Statistics, *Sourcebook of Criminal*

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[4] Judge Michel recognized that the decision in this case "create[s] an apparent split among Circuits." 122 F.3d at 192.

[5] The Harvard student author counts seven circuits to the contrary of the court below, along with "[m]ost state courts." 111 Harv.L.Rev. at 1142-43 n.32.

Justice Statistics 1996, at 448 (24th ed., U.S. Dept. of Justice, 1997) (table 5.27).[6] In the vast majority of federal cases, sentencing is realistically the most important issue. Conduct the defendant has not admitted and for which she has not been convicted at trial can add years to her punishment in the most routine of cases. USSG § 1B1.3 ("relevant conduct" rule); see *United States v. Watts*, 519 U.S. 148 (1997) (per curiam); *United States v. Witte*, 515 U.S. 389 (1995). "The Sentencing Guidelines instruct *the judge* in a case like this one to determine . . . the amount . . . of 'controlled substances' for which a defendant should be held accountable. . . ." *Edwards v. United States*, 523 U.S. --, 140 L.Ed.2d 703, 708, 118 S.Ct. 1475 (1998) (emphasis original).

The circuits which have addressed the issue are unanimous in holding that the amount of drugs that counts in a 21 U.S.C. § 846 conspiracy case to trigger a mandatory minimum term under the "case . . . involving" language of § 841(b)(1)(A) is subject to a "relevant conduct" analysis judicially borrowed from section 1B1.3 of the Guidelines.[7] *Cf. Edwards*, 140 L.Ed.2d at 708. The

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[6] Of 60,255 total federal defendants in 1996, the cases of 7083 were dismissed for various reasons. Of the remaining 53,172 defendants, 48,196 (90.6%) pleaded guilty or nolo contendere. Thus, in total, 80% of federal cases ended in guilty pleas (48,196/60,255); of all those convicted, 92% were convicted by plea. *Id.*

[7] *United States v. Ruiz*, 43 F.3d 985, 992 (5th Cir. 1995); *United States v. Young*, 997 F.2d 1204, 1210 (7th Cir. 1993); *United States v. Irvin*, 2 F.3d 72 (4th Cir. 1993); *United States v. Martinez*, 987 F.2d 920 (2d Cir. 1993); *United States v. Jones*, 965 F.2d 1507 (8th Cir. 1992).

court's imposition of a mandatory minimum ten-year term at petitioner's sentencing, predicated on the district judge's determination of the amount of drugs "involv[ed]" in her part of the conspiracy, was critically based on the adverse inference it drew from her silence.

Because the decision below is incompatible with the language of the Fifth Amendment and with this Court's precedent, the judgment of the court below must be reversed.

1. The Decision Below Is Unsupported by this Court's Prior Cases and Is Contrary to the Policies of the Fifth Amendment Privilege.

Because the "Fifth Amendment privilege is 'as broad as the mischief against which it seeks to guard,' " *Estelle v. Smith*, 451 U.S. 454, 468 (1981) (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)), the defendant must have a right to remain silent without penalty at sentencing. That position is most consistent with this Court's precedent, which has never directly addressed the point. In *Estelle v. Smith*, this Court considered statements the defendant made during a court-ordered competency evaluation. The psychiatrist's observations were later used in support of the state's claim for a death penalty. This Court held the statements inadmissible under the Fifth Amendment in the absence of the warnings mandated by *Miranda v. Arizona*, 384 U.S. 436 (1966). *Smith*, 451 U.S. at 461-69.[8]

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[8] The Court also held that the Sixth Amendment requires, in this context, that defense counsel be notified in advance of the planned interview. 451 U.S. at 469-72. Then-Justice Rehnquist concurred in the judgment on Sixth Amendment grounds but disagreed with respect to the applicability of the Fifth Amendment to punishment issues. 451 U.S. at 474-76. No other Justice joined in that position, which the court below effectively adopted, albeit without even citing *Estelle v. Smith*.

The majority in *Smith* reaffirmed the Court's long-held position:

> that 'the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.'

451 U.S. at 462-63 (citations omitted).[9] The "proceeding" in *Smith* was the sentencing phase of a capital case, but nothing in the Court's rationale suggests any basis to limit that decision to capital proceedings, nor does anything in the text or the purpose of the Fifth Amendment's self-incrimination clause. *Cf. Delo v. Lashley*, 507 U.S. 272, 286 n.7 (1993); *Gardner v. Florida*, 430 U.S. 349, 357-60 (1977) (plurality) (discussing circumstances in which "process" which is "due" may vary according to whether it is "life" or "liberty" of which the state seeks to deprive the citizen).

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[9] The Court reserved decision on the question whether, in other contexts, *Miranda* warnings are always required when a convicted defendant is interviewed in custody to obtain information for sentencing. *Smith*, 451 U.S. at 469 n.13. In that reservation, the Court did not intimate doubt about the applicability *vel non* of the Fifth Amendment privilege at the sentencing stage of a "criminal case"; the concern was with such *Miranda*-related matters as "custody" and "interrogation."

Likewise, in *Roberts v. United States*, 445 U.S. 552, 559-61 (1980), the Court rejected a claim that the defendant could remain silent at sentencing without penalty, on the sole ground that the constitutional privilege had not been contemporaneously invoked. No Justice suggested that analysis of a forfeiture of the right was irrelevant because the Fifth Amendment privilege was inapplicable.[10]

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[10] In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), while discussing the question whether the Fourth Amendment regulated the conduct of American officials operating against non-citizens on foreign territory, the Court's dictum described the Fifth Amendment privilege as "a fundamental trial right of criminal defendants," and commented that a "violation [of the privilege] occurs only at trial." *Id.* at 264. The Court was not discussing in that passage the possibility of a Fifth Amendment violation occurring at sentencing, but rather was contrasting the operation of the Fifth Amendment privilege, which operates *in* the courtroom, with the Fourth, which directly regulates the conduct of law enforcement officials in the field. The Court's citation to *Kastigar v. United States*, 406 U.S. 441, 453 (1972) , as authority for that assertion further shows that the Court was not suggesting that a violation of the Fifth Amendment privilege could only be consummated by the use of compelled testimony during a trial. (Nor would anyone argue that the privilege was inapplicable at a bail hearing, a suppression hearing, a hearing on post-trial motions, or any other proceeding "in [the] criminal case" but which is not part of the trial.) The cited page of *Kastigar* asserts that the privilege bars "prosecutorial authorities from using the compelled testimony in *any* respect" (emphasis original), so as to insure "that the testimony cannot lead to the infliction of criminal penalties on the witness." *Id.* The focus on "penalties" rather than on conviction itself is attributed in *Kastigar* to authorities spanning nearly a century of precedent. *Id.* at 453 & n.38.

This Court has had recent occasion to elaborate and explore the interrelated policies served by the Fifth Amendment privilege. These reflect "many of our fundamental values and most noble aspirations. . . . " *United States v. Balsys*, 524 U.S. --, 118 S.Ct. 2218, 2231 (1998), quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). Most if not all of these are equally applicable to compulsion imposed at sentencing to reveal punishment-enhancing facts about one's own activities:

> the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by . . . requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life[; and] our distrust of self-deprecatory statements;. . . .

118 S.Ct. at 2231. While the Guidelines system placed the burden of proving the extent of petitioner's conduct on the government for sentencing purposes, her own silence was used to effectively reverse that burden. The sentencing thus became essentially inquisitorial, involving an attempt to force the petitioner into degrading self-accusation that would potentially expose her to a four-fold increase in punishment. The Constitution prohibits such cruel compulsion.

Not only is petitioner Mitchell's Fifth Amendment claim consistent with precedent and principle, but it is

also supported by the actual language of the Fifth Amendment privilege.[11] For these reasons, the judgment of the Third Circuit must be reversed.

2. The Plain Language of the Fifth Amendment Applies Between Conviction and Sentencing Without Regard to the Risk of Incrimination for Other Offenses.

The Fifth Amendment protects every "person" against being "compelled in any criminal case to be a witness against himself." If the defendant must choose between testifying and facing greater punishment, there is Fifth Amendment compulsion. The court below professed that it could "see nothing in the Fifth Amendment . . . that provides any basis for holding that the self-incrimination that is precluded extends to testimony that would have an impact on the appropriate sentence for the crime of conviction." 122 F.3d at 191. But under the plain language of the amendment, "self-incrimination" is not

[11] Although this case arises out of a federal criminal prosecution, it does not seem possible for this Court to avoid the constitutional question on statutory grounds. The question whether the defendant may, without adverse inference, remain silent at sentencing is not addressed in Fed.R.Crim.P. 32 or in the United States Sentencing Guidelines' procedural provisions (*see* USSG ch. 6.A.), nor is it addressed by 18 U.S.C. § 3481 ("*In trial* of all persons charged with the commission of offenses against the United States . . . , the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.") (emphasis added); see generally *Bruno v. United States*, 308 U.S. 287 (1939).

the sole test. The core guarantee of the Fifth Amendment privilege is against being compelled "in a criminal case" to "be a witness against" oneself. *Counselman v. Hitchcock*, 142 U.S. at 562. "Where there has been genuine compulsion of testimony, the right has been given broad scope." *Michigan v. Tucker*, 417 U.S. 433, 440 (1974).

Sentencing surely occurs "in" the "criminal case," and the adverse inference applied against petitioner Mitchell "compelled" her to "be a witness against" herself at that proceeding. See *James v. Kentucky*, 466 U.S. 341, 344 (1984) ("to effectuate the right to remain silent, a trial judge must instruct the jury not to draw an adverse inference from the defendant's failure to testify if requested to do so"); accord, *Carter v. Kentucky*, 450 U.S. 288 (1981); see also *Griffin v. California*, 380 U.S. 609 (1965). Sentencing judges, like juries, are bound to reject the unconstitutional inference.

Under the Third Circuit's holding there is nothing to stop a prosecutor from calling the defendant to the witness stand at sentencing and moving for contempt if she refuses to answer punishment-enhancing questions, or even from calling the defendant before a grand jury after conviction and prior to sentencing. Authorities on the grand jury all agree that such possibilities are inconsistent with the constitutional privilege. *See* Sara S. Beale, Wm. C. Bryson, *et al.*, 1 Grand Jury Law and Practice § 6:10, at 6-80 (2d ed. 1997) (citing 3 circuits and 6 states); Grand Jury Project, 1 Representation of Witnesses Before Federal Grand Juries § 8.5(e), at 8-19 (3d ed. R.J. Klieman rev. 1998).

Indeed, if the lower court were right, the prosecutor could use testimony immunized under 18 U.S.C. § 6002 against that witness at his or her subsequent sentencing. This Court's decision upholding the constitutionality of that statute holds any such practice invalid. "Immunity [under the federal act] . . . prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Kastigar v. United States*, 406 U.S. 441, 453 (1972) (emphasis original).

The decision below would also compel a defendant's response to every inquiry of a U.S. Probation Officer in the presentence investigation, since there would be no privilege to withhold sentence-increasing responses. The better-reasoned authority holds otherwise. *Jones v. Cardwell*, 686 F.2d 754 (9th Cir. 1982) (Fifth Amendment applies to presentence investigation interview of detained convict)[12]; accord, *United States v. Miller*, 910 F.2d 1321, 1332 (6th Cir. 1990) (Merritt, C.J., dissenting), *cert. denied*, 498 U.S. 1094 (1991); *cf. United States v. Cortes*, 922 F.2d 123, 126 (2d Cir. 1990) (rationale of contrary cases not "altogether persuasive").

The well-known catch-phrase "self-incrimination" does not appear in the Clause itself, and does not capture the full scope of the privilege. That expression is actually shorthand for an elaboration of the Amendment's literal

[12] Without deciding the *Miranda* issue, *id.* at 757 n.2, the *Jones* court granted habeas relief to a defendant who had been ordered by the court to cooperate and follow instructions in the presentence interview.

protection – an important development, to be sure, but still an extension of the language. The broader protection against "self-incrimination" that courts have fashioned to enforce the Fifth Amendment privilege explains why the right can also be invoked in *any* case, civil or criminal, when the potentially incriminating answers could be used against the witness in a future criminal case. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).[13] But in the criminal case itself, the defendant cannot even be called to the witness stand by the prosecutor, regardless of the nature of the questions to be asked, without literally violating the privilege against being made "a witness against himself" that applies "in a criminal case."[14]

[13] See also *Baxter v. Palmigiano*, 425 U.S. 308, 316-20 (1976) (Fifth Amendment claim available to prisoner in disciplinary proceeding, but adverse inference may be drawn); *Garner v. United States*, 424 U.S. 648, 658 (1976) (privilege may be claimed in response to question on tax return, but is waived if not invoked); *United States v. Kordel*, 397 U.S. 1 (1970) (available to civil litigant responding to interrogatories, but must be invoked); *Arndstein v. McCarthy*, 254 U.S. 71 (1920) (available to debtor in bankruptcy; dismissal of imprisoned contemnor's habeas corpus petition reversed), *clarified on denial of mtn. for interv. & rearg.*, 254 U.S. 379 (1920). Accord, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. --, 140 L.Ed.2d 387, 118 S.Ct. 1244 (1998) (adverse inference permissible from applicant's refusal to be interviewed in connection with clemency application, a nonjudicial, post-conviction process that is no longer "in [the] criminal case").

[14] By its text, the Fifth Amendment privilege against being compelled to be a witness against oneself "in any criminal case" applies fully at sentencing, regardless of whether the convicted defendant is then still an "accused" facing a "criminal prosecution" under the Sixth Amendment. See *United States v. Balsys*, 118 S.Ct. at 2222-23; *Counselman v. Hitchcock*, 142 U.S. at

Turning on its head a concept that was developed to ensure a fully effective application of the privilege, the court below employed the phrase "self-incrimination" as a device for narrowing the Amendment's core protection. That essential guarantee – the right of a criminal defendant to remain entirely silent and entirely absent from the witness stand in his or her own case – is ignored by the decision below. For this most basic reason, reversal is mandated.

3. A Guilty-Pleading Defendant Is Not Differently Situated from a Defendant Who Has Gone to Trial with Respect to Fifth Amendment Rights at Sentencing.

The right of any person to claim the Fifth Amendment privilege with respect to the instant offense should be held to apply until the "criminal case" terminates, that is, when the conviction becomes final. Thus, at least while the right of direct appeal remains available, the privilege survives.[15] The leading treatises agree. See, *e.g.*, 1 McCormick on Evidence § 121, at 440 (4th ed. J.W. Strong 1992);

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563 (scope of Sixth Amendment's application to "criminal prosecutions" is "much narrower" than Fifth Amendment's reference to "any criminal case"); *cf. Williams v. New York*, 337 U.S. 241 (1949) (due process clause does not require confrontation of witnesses, so as to preclude use of hearsay brought in through probation report at capital sentencing).

[15] A judgment of conviction "becomes final" on the date that direct appellate review, including certiorari to this Court, is completed, or the time to seek that review expires. See *Caspari v. Bohlen*, 510 U.S. 383, 390-91 (1994); *Graham v. Collins*, 506 U.S. 461, 467-68 (1993); *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6

see also Annot. (Soeffing), "Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question," 9 A.L.R.3d 990 (1966 & 1996 Supp.). Under the Fifth Amendment, a defendant who has pleaded guilty but has not yet been sentenced is not situated any differently from one who has stood trial and may appeal for a retrial.

The court below cited *Reina v. United States*, 364 U.S. 507, 513 (1960), as if it supported a different conclusion, *see* 122 F.3d at 189, but that case is entirely inapposite. The petitioner there refused to testify before a grand jury after he had been convicted and sentenced, and had begun to serve the term imposed. This Court held that Reina's refusal to answer questions about his offense could be valid in relation to potential state charges, but that this risk had been removed by a grant of immunity. There is nothing in the holding of that case to support the decision below.

Contrary to the suggestion of the court below, statements compelled at sentencing may indeed tend to incriminate the defendant in the same case, notwithstanding the entry of a conviction upon accceptance of the plea. Even when the defendant has pleaded guilty, as

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(1987); *Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986) (per curiam). And even if a line could be drawn earlier than the termination of the appellate process, it should at least be clear that during the sentencing proceedings, a conviction, whether by plea or verdict, is not final. Indeed, it could be argued that a risk of self-incrimination exists for at least a year *after* the termination of direct appeals, which is when the conviction lies beyond conventional challenge. *Cf.* 28 U.S.C. § 2255 (statute of limitations allowing one year after finality to bring motion to vacate).

here, a right of appeal remains, which may sometimes lead to a trial. This may occur if the defendant has moved to withdraw her plea before sentencing under Fed.R.Crim.P. 32(e) but has been denied, from which denial an appeal could arise. Even in the absence of such a motion, a defendant may nevertheless appeal on the basis of substantial defects in the Rule 11 colloquy, see *McCarthy v. United States*, 394 U.S. 459 (1969), or to challenge the factual basis for the plea, see *Henderson v. Morgan*, 426 U.S. 637 (1976); *North Carolina v. Alford*, 400 U.S. 25 (1970), or to claim a breach of a plea agreement; see *Santobello v. New York*, 404 U.S. 257 (1971). Any of these appeals may lead to vacatur of the plea and a trial on the underlying charge. Until the appeal terminates or the time to take a direct appeal expires, the defendant must be permitted to remain silent with respect to the underlying charges in the case.

The decision below not only misapprehended the risk of further incrimination after the acceptance of a guilty plea, but it also conflated that issue with the distinctly separate question of waiver. 122 F.3d at 191. The Fifth Amendment privilege is not forfeited, as to all matters related to the crime of conviction, by the mere fact of the plea itself. A "waiver" of the privilege by testifying on a certain subject is binding only during the same "proceeding," meaning that particular stage of the case.[16] *See*

[16] The United States conceded this point in answering the petition for certiorari, Brief in Opp. at 13-14, but failed to recognize that sentencing is a different "proceeding" under this doctrine from the change of plea hearing. Thus, even if the clause of Fed.R.Crim.P. 11(c)(5) that allows the district court to question the defendant under oath "about the offense to which the defendant has pleaded," does not allow the defendant to invoke the Constitution to decline to answer those questions, it is only because that colloquy occurs in the "same proceeding" as the plea itself and involves an inquiry into the "details" of what the plea itself necessarily admits. *Rogers v. United States*, 340 U.S. 367, 373 (1951).

Annot. (DiSabatino), "Right of witness in federal court to claim privilege against self-incrimination after giving sworn evidence on same matter in other proceedings," 42 A.L.R.Fed. 793 (1979). See generally *Brown v. United States*, 356 U.S. 148 (1958) (defendant may not testify in own defense but decline to be cross-examined in reliance on Fifth Amendment).

When the courts say that a defendant waives his or her rights under the Fifth Amendment by pleading guilty, they mean only that the defendant may choose not to plead guilty, and instead may stand on the right to remain silent and put the government to its proof of the elements; in other words, that the defendant may refuse to change her plea and may insist instead on the Sixth Amendment right to trial. See, *e.g.*, *Parke v. Raley*, 506 U.S. 20 (1992); *Boykin v. Alabama*, 395 U.S. 238 (1969).

That dictum does not mean that the guilty-pleading defendant no longer has any Fifth Amendment rights in relation to the general subject matter of the offenses of conviction. Nor does it mean that at a later stage, such as sentencing, the waiver implicit in the change of plea itself still obtains. *See* Recent Cases, 111 Harv.L.Rev. at 1143-44. The standard plea colloquy under Federal Criminal Rule 11, as followed in this case (the record shows), only warns the defendant, so far as the Fifth Amendment

privilege is concerned, that by pleading guilty she gives up the right to trial, "and *at that trial* . . . the right against compelled self-incrimination. . . . " Fed.R.Crim.P. 11(c)(3). No broader waiver of petitioner's Fifth Amendment rights was secured when she pleaded guilty, nor could any judge insist on a broader waiver as a condition of accepting the plea.

The use of an adverse inference to tip the balance against petitioner in the computation of drug quantities necessary to trigger a mandatory minimum sentence (or to establish "relevant conduct" justifying an increased guideline sentence) was therefore unconstitutional notwithstanding her plea of guilty.

4. Petitioner, Like Virtually Every Federal Defendant, Risked Self-Incrimination at Sentencing on Numerous Other Offenses.

Apart from the validity of petitioner Mitchell's claim of a Fifth Amendment privilege at sentencing with respect to the offense of conviction, her claim should have been sustained in view of the sundry other crimes for which she could still be prosecuted. The court below was mistaken in distinguishing this case from others on the basis that "Mitchell does not claim that she could be implicated in other crimes by testifying at her sentencing hearing." 122 F.3d at 191. She had no burden to make that claim. Whenever the risk of self-incrimination is apparent, a court must sustain the assertion of the privilege. *Malloy v. Hogan*, 378 U.S. at 14, quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

In *Hoffman*, this Court ruled that a witness may not be required to answer after claiming a Fifth Amendment privilege unless it is "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency to incriminate." 341 U.S. at 488. The self-incrimination privilege "must be accorded liberal construction in favor of the right it was intended to serve." *Id.* at 486. The decision below ignored the established precept that while the defendant or witness bears the burden of claiming the privilege, only in the atypical situation where it is not evident from the questions and their context where the potential for self-incrimination may lie should the court demand that the witness proffer the basis for the constitutional claim.[17] Even then, under *Hoffman*, the claimant does not bear the ultimate burden of establishing the claim of privilege. The failure of petitioner's counsel to articulate a theory of risk of incrimination on other charges is therefore a red herring in this case.

Here, the basis for petitioner's claim, as to additional offenses, was perfectly evident. In this case particularly, where the petitioner had pleaded "open" to all counts and there was no plea agreement, the government was free, if it wished, to prosecute her further for any number of other offenses, including particular transactions in furtherance of the same conspiracy that were the very basis for the "relevant conduct" determination. See *United*

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[17] Only a mere unexplained statement that the information sought would or could tend to incriminate the witness may be held insufficient. *Hoffman*, 341 U.S. at 486.

States v. Witte (Double Jeopardy Clause does not bar successive prosecution for offense that was accounted for as "relevant conduct" at sentencing in a prior case); *United States v. Felix*, 503 U.S. 378 (1992) (substantive crime and conspiracy to commit it are two different offenses).[18] Indeed, at the time of her sentencing, in July 1996, petitioner faced a "real and appreciable" risk[19] of further prosecution on many state or federal charges that might occur to an imaginative prosecutor wandering the pages of our over-criminalized statute books, all of which must necessarily have been evident to any judge evaluating her assertion of the privilege.

Indeed, if petitioner had no Fifth Amendment right to remain silent after pleading guilty, there would be little impediment to the government's choosing to seek additional charges in response to a defendant's refusal to provide information between plea and sentencing about her own conduct and that of others. Compare *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978), with *Blackledge v. Perry*, 417 U.S. 21 (1974).

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[18] Her penalized silence concerned drug transactions other than the three which she admitted by pleading guilty to the substantive counts, but which were deemed "relevant conduct" under USSG § 1B1.3. To qualify as "relevant" any additional transaction had to consist of criminal conduct. *United States v. Dickler*, 64 F.3d 818, 830-31 (3d Cir. 1995). These transactions were also expressly treated as "involv[ed]" in her instant conspiracy offense so as to trigger a mandatory ten-year term under 21 U.S.C. § 841(b)(1)(A)(ii)(II).

[19] *Marchetti v. United States*, 390 U.S. 39, 48 (1968), quoting *Brown v. Walker*, 161 U.S. 591, 599 (1896) (in turn quoting British case law).

If a court is convinced that a question cannot possibly involve self-incrimination, the witness can be compelled to testify. *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 478 (1972).[20] On the other hand, neither the absence of a current investigation or charge, nor informal assurances of police or prosecutorial authorities concerning a lack of present intention to prosecute, will suffice to overcome a claim of the privilege; it is enough that the defendant have reasonable cause to apprehend danger of prosecution as a result of the disclosures. *Hoffman*, 341 U.S. at 486. The casual dismissal of petitioner's claim by the court below stands in stark contrast to this Court's standard.[21]

For all these reasons, petitioner's reasonable apprehension of prosecution for additional offenses also justified her invocation of the Fifth Amendment privilege at

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[20] For example, the statute of limitations may have run on that offense, see *Balsys*, 118 S.Ct. at 2221 n.1, or the claimant may already enjoy double jeopardy protection from prosecution. In *Zicarelli*, the Court found that although the witness might reasonably fear a foreign prosecution generally, there was no logical connection between that risk and the questions he had refused to answer in New Jersey. But see *United States v. Balsys* (right against self-incrimination generally does not extend to concern with potential foreign prosecution).

[21] In none of this Court's cases is the existence of a current criminal investigation said to be a requirement for a Fifth Amendment claim. In fact, the cases say the opposite. See, *e.g.*, *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984) ("answers that would incriminate him in a *pending or later* criminal prosecution") (emphasis added); *Maness v. Meyers*, 341 U.S. 479, 462 (1975).

sentencing, and therefore barred the district court from drawing an inference against her.

CONCLUSION

For the foregoing reasons, NACDL and FAMM urge this Court to correct the manifest constitutional error in the decision below. The Court should reverse the judgment of the United States Court of Appeals for the Third Circuit and remand the case with directions to allow petitioner a resentencing.

Respectfully submitted,

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